Office-Supreme Court, U.S.
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80-1657

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

LYNN EDWARD FLETCHER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

WILLIAM B. MOFFITT
J. FLOWERS MARK
NINA J. GINSBERG
MARK & MOFFITT, P.C.
1001 Duke Street
Alexandria, Virginia 22314
(703) 549-4333

GERALD BRUCE LEE
LAW OFFICES OF
GERALD BRUCE LEE
1001 Duke Street
Alexandria, Virginia 22314
(703) 549-1172
Attorneys for Petitioner.

April 2, 1981

Washington, D.C. • THIEL PRESS • (202) 638-4521

QUESTIONS PRESENTED

I. Whether a finding of probable cause to arrest persons suspected of criminal activity could constitutionally have authorized the blanket arrest, without a warrant, of visitors at a private hotel room, where the sole basis for the blanket arrest, was the visitors' presence in the hotel room and the belief by DEA agents that the room was frequented by persons connected with the suspected criminal activity?

II. Whether the arrest, without a warrant of petitioner, in a private hotel room, was constitutionally authorized where DEA agents could not establish petitioner's actual connection with either the premises, or the suspected unlawful activity, and where his arrest was based upon mere propinquity of his person to others independently suspected of criminal activity?

III. Whether the sixth amendment guaranty of effective assistance of counsel and the fifth amendment right to due process of law were violated when the District Court denied petitioner's motion for continuance after petitioner was abandoned by retained counsel and forced to proceed to trial with substitute counsel who acknowledged his unpreparedness to proceed.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

LYNN EDWARD FLETCHER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Lynn Edward Fletcher, by his undersigned counsel, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on December 18, 1980, rehearing denied on February 19, 1981.

OPINION OF THE COURT BELOW

The Opinion of the Court of Appeals for the Fourth Circuit is reported at 637 F.2d 227 (4th Cir. 1980). The Order denying rehearing was filed on February 19, 1981.

JURISDICTION

The Judgment of the Court of Appeals affirming the Judgment of the United States District Court was entered on December 18, 1980. The Petition for Rehearing with Suggestion for Rehearing En Banc was denied on February 19, 1981. This Petition is filed pursuant to Rule 20, Rules of the Supreme Court, as amended. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code §1254(1).

CONSTITUTIONAL PROVISIONS

Amendment IV, Constitution of the United States:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V, Constitution of the United States:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

Amendment VI, Constitution of the United States:

"In all criminal prosecution, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

On December 4, 1977, agents of the United States Customs Service intercepted a shipment of hashish at Dulles International Airport based upon information from customs broker Frank Bailey. Frank Bailey was hired by William Coury, an Atlanta businessman, to arrange for inspection and delivery of the shipment.

Agents of the Customs Service and the Drug Enforcement Administration (DEA) arranged a controlled delivery of the hashish to William Coury. Specific arrangements for the delivery were made between Coury and the cooperating customs broker, Bailey.[1]

On December 5, 1977, the agents observed Coury at the Dulles Holiday Inn Motel. At about 7:00 AM, DEA agents set up surveillance at the motel. Coury was observed visiting room 141 during the later hours of the afternoon. He exited in the company of two males, neither of whom was the Petitioner. The agents also observed several men enter and depart rooms 141 and 142.

Petitioner was first observed by DEA agents at about 12:30 P.M. on December 5, 1977, in the motel lobby, and in the dining room of the motel. Petitioner was not previously known to any of the agents. (A.343a). The testimony of the agents who conducted the surveillance was that Petitioner was a visitor, but not a registered guest of the Holiday Inn and that room 141 was registered to a Jeff Wheeler.[2] The only information the

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[1] At Coury's direction, Bailey called room 141 at the Dulles Holiday Inn Motel on December 4, 1977, and was referred to another number. (A.345a-346a).

[2] DEA agent Feldman testified that he had ascertained from a room clerk that someone named Lynn Fletcher was staying in

[footnote continued]

agents had about the Petitioner was that Petitioner was seen eating and talking on at least two occasions with persons observed entering and departing room 141. No activity indicative of criminal conduct was observed. (A.348a-349a, 406a-407a).

Later on December 5, 1977, DEA agents arrested two men picking up the hashish shipment at a Manassas, Virginia warehouse, and three other subjects, including William Coury and Donald David Haynie, in a car at a location in Rockville, Maryland. (A.307a-308a).

After the seizure of the hashish shipment, armed DEA agents proceeded without warrants to the Holiday Inn to arrest the men in rooms 141 and 142. When eight agents entered room 141, Petitioner was reclining on a bed in front of a television tuned to a sporting event. Another man was reclining on the other bed and a man was sitting in a chair. (A.311a). No evidence of cash or contraband and no furtive movement was noted by the agents. (A.344a-350a). At least one agent testified that he had no specific knowledge directly connecting any person present in room 141 with the illegal hashish shipment. (A.345a-347a). The four men present in room 141 were placed under arrest.[3]

In September, 1978, an indictment was returned against Petitioner and others in the United States District

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room 141 with Jeff Wheeler. Feldman also testified that his contemporaneous notes indicate only that he observed Petitioner go to the dining room at 12:00 and that he saw Petitioner later at 3:00. (A.403a, 405a and 470a).

[3] Two briefcases and luggage were seized from the floor. No weapons were seized. A search of one briefcase revealed notebooks and papers of no evidentiary value. The second briefcase contained a large quantity of United States currency and no identifying data.

Court for the Eastern District of Virginia. Gerald B. Lefcourt of New York entered his appearance as trial counsel on behalf of Petitioner. Mr. Lefcourt retained Gerald Bruce Lee of Alexandria, Virginia as local counsel. Local counsel was informed by Mr. Lefcourt that his responsibility would not include interviewing the Petitioner, reviewing the United States Attorney's files, participation in the defense strategy or planning sessions, or drafting or preparing of pleadings.

Petitioner joined in a Motion to Suppress Evidence based, in part, upon the alleged absence of probable cause for his arrest. On November 13, 1978, at the hearing on Petitioner's motion, local counsel met Petitioner for the first time outside the courtroom at the United States Courthouse. Mr. Lefcourt argued motions for Petitioner without any participation by Mr. Lee. The District Judge ordered the *Jencks* material be furnished to counsel no sooner than five days prior to trial. On November 17, 1978, the District Court denied Petitioner's Motion to Suppress.[4] Trial was set for November 27, 1978.

On November 22, 1978, Mr. Lefcourt advised local counsel for the first time of a plea bargain offer made by the government to Petitioner. Mr. Lefcourt also advised Mr. Lee that Petitioner was not disposed to accept the offer and that he (Lefcourt) had told Petitioner that if

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[4] No taint hearing was required in light of the court's ruling on the suppression issues. The Court of Appeals, however, made the unsubstantiated finding that the identification of Petitioner, at the grand jury or otherwise in the investigation by the government witness Snow, was in no way related to fruits of Petitioner's arrest. 637 F.2d at 238. The record was not developed along these lines and Snow never made an in-court identification of Petitioner. Petitioner seeks a remand for a taint hearing of his conviction is reversed on a finding of no probable cause.

the case went to trial, Mr. Lee would have to try it. (S.A.40). Mr. Lee advised Mr. Lefcourt that he was unfamiliar with the facts underlying the indictment and that he had never so much as interviewed the Petitioner. (S.A.41). Mr. Lee was eventually able to contact Petitioner by telephone on November 23, 1978.

On November 24, 1978, Mr. Lee went to the United States Attorneys' office in Alexandria, Virginia, to view thousands of pages of discovery for the first time.[5] No witnesses had yet been subpoenaed for trial on Petitioner's behalf.

Mr. Lee informed Mr. Lefcourt by mailgram on November 24, 1978 that, in his judgment, it was not in the best interest of their client for him to appear as trial counsel, as he had not had the opportunity to adequately prepare for this case. (S.A.41).

The case was called for trial on November 27, 1978. Mr. Lefcourt failed to appear. Mr. Lefcourt filed no motion requesting leave to withdraw nor was the court informed by Mr. Lefcourt of his intention not to appear.

Mr. Lee filed a Motion for a Continuance or Severance immediately after the case was called, accompanied by the affidavit of Mr. Lee[6] and the Affidavit of Petitioner

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[5] At a Chambers conference, not in the record, the District Judge refused to order the United States Attorney to provide local counsel with copies of the *Jencks* material because of the reproduction costs to the government.

[6] In the affidavit filed by Mr. Lee with the District Court, Mr. Lee stated, *inter alia*, that he had advised Mr. Lefcourt that he was unfamiliar with the underlying facts of the case and had not interviewed the Petitioner, that he felt unprepared to go forward with the trial of this case, and that he eventually had a one hour interview with the Petitioner. (S.A.41).

(S.A.31, 40-44). The affidavit of Petitioner contained the following averments:

> I think the Court ought to be advised as follows: Mr. Lee was and is not counsel of my choice as trial counsel in this matter and my only association with him is as stated in this affidavit. While I have no question of Mr. Lee's skill as an advocate, I am concerned for my defense and freedom as a result of his complete lack of time to discuss this matter with me to fully investigate and prepare my defense. I believe I have an alibi defense to at least one of the acts charged in the indictment and I have informed Mr. Lefcourt, but I am informed that no witnesses have been subpoenaed. (S.A.44).

The District Judge denied Petitioner's motion and trial commenced over the objections of Petitioner and local counsel.

Petitioner was convicted of possession with intent to distribute marijuana or hashish and was sentenced to a period of confinement of six months, three years probation, and a special parole term of two years.

The United States Court of Appeals for the Fourth Circuit affirmed Petitioner's conviction on December 18, 1980. Rehearing was denied on February 19, 1981.

REASONS FOR GRANTING THE PETITION

I.

THE DECISION OF THE COURT OF APPEALS, UPHOLDING A FINDING OF PROBABLE CAUSE FOR PETITIONER'S ARREST, WHICH WAS BASED SOLELY UPON HIS PRESENCE IN AND AROUND A PRIVATE HOTEL ROOM AND ASSOCIATION WITH PERSONS SUSPECTED OF CRIMINAL ACTIVITY, IS IN DIRECT CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND THE CIRCUIT COURTS OF APPEALS WHICH REQUIRE THAT A PARTICULARIZED NEXUS BE ESTABLISHED BETWEEN THE PETITIONER AND THE SUSPECTED UNLAWFUL ACTIVITY.

It has been sufficiently noted that the warrantless arrest of a person is a species of seizure required by the Fourth Amendment to be reasonable. *Payton v. New York*, 445 U.S. 573 (1980); *Beck v. Ohio*, 379 U.S. 89 (1964).

Petitioner argued that his arrest, without a warrant, was unreasonable because it was based solely upon his presence on December 5, 1977, in room 141 at the Dulles Holiday Inn motel and association with persons suspected of criminal activity.

A panel of the United States Court of Appeals for the Fourth Circuit decided that Petitioner's arrest in a private hotel room, without a warrant, was not unconstitutional because it was supported by the following probable cause:

> *Only a small part of the facts* surrounding the arrest show that room 141 was the communication center from which receipt of the importation of 800 pounds of illegal hashish was arranged by Haynie and others. *Fletcher had been seen in and around the motel just prior to the arrest* and it was known

> that he was staying in room 141 with Haynie, a key suspect as the leader of the drug ring. The consignee of the hashish, one Coury, also visited room 141 that day. (emphasis supplied).[7]

United States v. Haynie, 637 F.2d 227, 237-38 (4th Cir. 1980).

This holding is in direct conflict with the prior decisions of this Court in *Ybarra v. Illinois*, 444 U.S. 85 (1979); *Sibron v. New York*, 392 U.S. 40 (1968) and *United States v. DeRi*, 332 U.S. 581 (1948), and substantially deviates from the Fourth Amendment concept of limited intrusion which requires that a particularized nexus be established between Petitioner and the suspected unlawful activity.

The only authority cited by the panel for its decision is the partial quotation from the concurring opinion of Mr. Justice Douglas in *Sibron v. New York* that:

> Consorting with criminals may in a particular factual setting be a basis for believing that *a criminal project* is under way. 392 U.S. at 68. (emphasis supplied).

637 F.2d at 238. It was the court's view that:

> . . . in the setting around room 141, the known communications center for the importation of such a large amount of illegal drugs, the officers had probable cause to arrest everyone who was reasonably connected with the known participants. Fletcher was so connected.

Id.

The partial reference to the concurring opinion strains the Justice's meaning which refers only to the possible

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[7]The testimony of the DEA agents who conducted the surveillance at the Holiday Inn was that Petitioner was not a registered guest at the motel and that room 141 was registered to a Jeff Wheeler. (A.348a-349a, 403a-407a).

existence of a criminal project. The full text is coincidentally omitted from the court's opinion and contains the remaining sentences:

> Yet talking with addicts without more rises no higher than suspicion. That is all was have here; and if it is sufficient for a "seizure" and a "search" then there is no such thing as privacy for this vast group of "sick" people.

392 U.S. at 68 (Douglas, J. concurring). At this time of the arrest in *Sibron*, the officer had observed the petitioner continually from the hours of 4:00 p.m. to 12:00 a.m. In this time, the officer saw Sibron conversing with six or eight persons whom he knew to be narcotics addicts. The officer heard none of these conversations and saw nothing pass between the petitioner and any of the others. Before he was arrested, Sibron was observed entering a restaurant and talking with three more known addicts. This Court dismissed any notion that there was probable cause to arrest the petitioner. 392 U.S. at 62.

The principle underlying *Sibron* is derived from the holding in *United States v. DeRi*, 332 U.S. 581 (1948). In *DeRi*, the defendant was a passenger in a car with a person implicated by a police informant for possessing counterfeit gas rationing coupons. This Court held that:

> We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled.

332 U.S. at 587. This limitation on presence was not affected by a simultaneous determination by the Court that "there is better reason to assume that no passenger in a car loaded with liquor would remain innocent of knowledge of the car's cargo . . ." *Id.* at 586-87.

In *Ybarra v. Illinois*, 444 U.S. 85 (1979), the Court observed that where the standard is probable cause

> . . . a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be.

444 U.S. at 91. The facts in *Ybarra* were that Ybarra was present, along with several other customers, in a public tavern at a time when the police had a warrant, based on probable cause, to search the tavern and the bartender. Like Petitioner's case, the police did not recognize Ybarra and had no independent reason to believe that he had committed, or was committing any offense. Ybarra made no gestures indicative of criminal conduct, made no movements suggesting an attempt to conceal evidence or contraband, and said nothing of a suspicious nature. It was the Court's view that "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." *Id.*

The Courts of Appeals are consistent in dealing with presence and association. In *Holloway v. Wolff*, 482 F.2d 110 (8th Cir. 1973), the Eighth Circuit heard a case similar to Petitioner's. In *Holloway*, the defendant was present at the residence of a friend where police had probable cause to believe that tavern robbers were meeting. The police were looking for two black males and the defendant was black. The court stated that "probable cause to believe that the culprits were meeting at the residence would prove insufficient for arresting anyone who happened to be on the premises without some

evidence linking the individual to the crime." 482 F.2d at 116. *See United States v. Collins*, 439 F.2d 610, 614-15 (D.C.Cir. 1971).

In *United States v. Wright*, 557 F.2d 376 (6th Cir. 1978), the defendant was arrested with one of a group of four airline tickets to Bangkok, Thailand, another of which was issued to a major drug dealer. The court found no probable cause, concluding that all the agent knew about Wright at the time of his arrest was "that he had undesirable associates and travelled to questionable places" 577 F.2d at 380. *See also United States v. Hunter*, 550 F.2d 1066 (6th Cir. 1977); *United States v. Miller*, 546 F.2d 251 (8th Cir. 1976); *United States v. Seay*, 432 F.2d 395 (5th Cir. 1970); *Compare United States v. Ashcroft*, 607 F.2d 1167 (5th Cir. 1979).

The record in Petitioner's case contains no factor or combination of factors which support the departure from established precedent by the Fourth Circuit in making its finding of probable cause for Petitioner's arrest.

II.

THE DECISION OF THE COURT OF APPEALS, UPHOLDING A FINDING OF PROBABLE CAUSE FOR PETITIONER'S ARREST IN A PRIVATE HOTEL ROOM, BASED SOLELY UPON HIS PRESENCE, RAISES IMPORTANT QUESTIONS NOT ANSWERED IN *YBARRA V. ILLINOIS*, CONCERNING WHETHER THE PUBLIC OR PRIVATE CHARACTER OF A PREMISES IN WHICH A DEFENDANT IS ARRESTED MAY CONTRIBUTE TO A FINDING OF PARTICULARIZED PROBABLE CAUSE.

It follows from *Ybarra v. Illinois*, that a warrant to search a place cannot normally be construed to authorize indiscriminate governmental intrusions into the privacy of each individual in that place. The finding of no

probable cause to search customers in a public tavern focused on the requirement that some particularized evidence link the individual to the crime. *Ybarra* provided no answer to the question whether probable cause may be inferred from the "public" or "private" nature of the premises, or whether the "public" or "private" character of a premises may contribute to the sum total of information giving rise to probable cause.

The decision of the Fourth Circuit in Petitioner's case attributes probable cause to what it determined was the necessary involvement of anyone present at a private hotel room from which the receipt of illegal hashish was arranged. "Certainly in the setting around room 141", the court stated, "the known communications center for the importation of such a large amount of illegal drugs, the officers had probable cause to arrest everyone who was reasonably connected with the known participants." *United States v. Haynie*, 637 F.2d at 238. The private character of the hotel room was viewed by the court as sufficient to reasonably connect everyone present with the known participants. The compact public tavern in *Ybarra* did not, under similar circumstances, give rise to the same inferences.

This term, the Court granted a Writ of Certiorari to the Supreme Court of Michigan in *Michigan v. Summers*, 407 Mich. 432, 286 N.W.3d 226 (1979), *cert. granted*, ____ U.S. ____, ____ S.Ct. ____, 66 L.Ed.2d 127 (1980) (No. 79-1794), to decide whether a premises search warrant for a private residence may be expanded to justify the search of an unnamed individual, absent conduct directing suspicion to that individual.[8] The

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[8] In *Summers*, the owner of a private residence was detained during the execution of a search warrant. As the officers arrived,

[footnote continued]

public-private dichotomy is equally implicated in *Michigan v. Summers* and Petitioner's case, and should be decided to prevent conflicting results in the circuits.

III.

THE DECISION OF THE COURT OF APPEALS DENYING PETITIONER'S MOTION FOR A CONTINUANCE AFTER PETITIONER WAS ABANDONED BY RETAINED COUNSEL AND FORCED TO TRIAL WITH SUBSTITUTE COUNSEL WHO ACKNOWLEDGED HIS OWN UNPREPAREDNESS RAISES IMPORTANT FIFTH AND SIXTH AMENDMENT QUESTIONS CONCERNING WHICH THERE IS A CONFLICT IN THE CIRCUITS AND A PARTICULAR NEED FOR UNIFORM STANDARDS.

This case comes before this Court in the unique posture of having had two lower courts completely ignore the Constitutional implications of the unauthorized abandonment of Petitioner by retained trial counsel on the day of the trial.[9] Petitioner was then forced to proceed to trial with counsel he had not chosen and with counsel who acknowledged prior to the commencement of the trial that he was unprepared.

As early as 1932, this Court stated:

> It is true that great inexcusable delay in the enforcement of our criminal law is one of the grave

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they saw a man, later identified as Summers, leave the front door of the house. Summers was searched after a search of the residence produced suspected narcotics.

[9] The only discussion of Petitioner's right to counsel argument appears in the final paragraph of the Fourth Circuit's opinion.

> We have also considered the remaining assignments of error including . . . the denial of a motion for continuance . . . We think all of these arguments are without merit.

United States v. Haynie, 637 F.2d at 238.

> evils of our time. Continuances are frequently granted for unnecessarily long periods of time and delays incident to the disposition of motions or motions for new trial and hearings upon appeal have come in many cases to be a distinct reproach to the administration of justice. The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense.

Powell v. State of Alabama, 287 U.S. 45, 59 (1932).

In an effort to strike a balance between the sometimes competing interest of society in the prompt disposition of a criminal case, and the right of the defendant to be represented by counsel who has had an adequate time to prepare, this Court has stated:

> . . . it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. Contrariwise a myopic insistent upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. (citations omitted).

Ungar v. Sarafite, 376 U.S. 575, 589 (1964).

Petitioner does not concede that the District Court's view was not myopic.[10] The myopia of a particular trial

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[10]U.S. District Judge Oren R. Lewis, sitting in the Eastern District of Virginia, was quoted in the Washington Star as saying:

"We continue to try a case in a day, which is unheard of."

* * * * *

Continuances, requests for more time, are rarely granted. Lewis said that if an attorney says his schedule is too busy to

[footnote continued]

judge should not be the focus of this inquiry. A better view would focus on whether the request for a continuance was made in good faith, without intent to delay, and ultimately, whether the continuance of the case was essential to the fair and impartial administration of justice and consistent with the goals of the Sixth Amendment.

The various circuits have taken differing approaches to the problem posed by this type of case. These varying approaches have led to a variety of inconsistent results amongst the circuits as well as within the same circuit. The decisions of the Fourth and Fifth Circuits provide the best examples of such inconsistencies.

A view of prior Fourth Circuit precedent illustrates an established pattern of inconsistency in deciding similar cases. In *United States v. Fisher*, 477 F.2d 300 (4th Cir. 1973), a panel of the Fourth Circuit was confronted with the following facts. At the arraignment, the defendant appeared with one attorney. It was later determined that the defendant could not afford this particular attorney. The defendant then retained another attorney who had a trial scheduled on the same day as the defendant's trial. A continuance was denied. The first attorney was called by the Clerk of the Court and obtained the file from the second attorney. When the case was called for trial, the original attorney moved for a continuance. The motion was denied and the attorney was permitted thirty minutes to consult with his client and case proceeded to trial. The panel held in reversing the defendant's conviction (1) that although the defense was conducted

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go to trial, he tells the defendant to get another attorney. Lewis said the court in Alexandria has been run this way.

Washington Star, Feb. 10, 1981, Local Section at 1, col. 2-5.

aggressively, inevitable prejudice resulted from the lack of preparation by counsel, and (2) that conviction without effective legal representation is a misplaced sanction for the shortcomings of a defendant's attorneys. 477 F.2d at 303.

In *United States v. Inman*, 384 F.2d 783 (4th Cir. 1973), defendant's appointed counsel was fired immediately prior to trial by the defendant and defendant's mother retained new counsel. Retained counsel requested a continuance. In upholding the defendant's conviction, the panel held that the outermost reach of discretion was exercised. While an attorney needs reasonable time to prepare for trial, counsel entered his appearance late after the case was set for approximately two months and the fact that the jurors and witness had been summoned militating against the grant of the continuance. 483 F.2d at 740. The punitive treatment of trial counsel in *United States v. Marx*, 555 F.2d 874 (4th Cir. 1977), materially differs from the results in other Fourth Circuit cases. In *Marx*, the attorney, was convicted of criminal contempt when he abandoned his client as Mr. Lefcourt did. The District Court acknowledged that Marx's behavior materially interfered with the trial and resulted in an obstruction of the administration of justice.[11] *See also United States v. Keagan*, 499 F.2d 376 (4th Cir. 1974).[12]

The Fifth Circuit decisions, while more consistent intra Circuit, are certainly inconsistent with the Fourth Circuit decisions. *Gandy v. State of Alabama*, 589 F.2d 1318

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[11]In Petitioner's case, the government conceded in rule to show cause issued against Gerald Lefcourt, that Lynn Fletcher's trial was adversely affected by Lefcourt's failure to appear.

[12]All of the Fourth Circuit cases cited originated in the Eastern District of Virginia.

(5th Cir. 1978), well illustrates the Fifth Circuit rule. The court described the facts in the following manner:

> The docket was called in the Jefferson County Circuit Court on February 22, 1971, and when the case against Petitioner was announced a Mr. Rainey told the court that Coleman, Petitioner's retained attorney, would be present on the next day, but that he did not have the authority to announce ready for the defense. At this point a strange sequence of events occurred. The case came on for trial the next day, February 23, 1971. The defense never formally announced ready; and Coleman advised the court that on the following day he would be engaged in the trial of a civil action in the Circuit Court of Talledega County and a jury had already been struck for the case the previous day with out-of-town witnesses having been subpoenaed. There is no indication in the record that Coleman made any effort to postpone or substitute other counsel in the civil case. Instead, he announced his intention to attend the other trial and moved for a continuance until the civil trial in Talledega County was complete. In the face of this ultimatum, the trial court did not even suggest that Coleman's abandonment would not be tolerated. Rather, he presented an attitude of insensitivity for Petitioner's rights by seemingly countenancing the proposed desertion by an officer of his court. After brief arguments, the motion for a continuance was denied. When it become obvious that Petitioner would be compelled to proceed to trial immediately, arrangements were made for J. Sherrill Hancock, Coleman's law partner, to assist in the case. Both Coleman and Hancock, strenuously objected to the denial of the motion for continuance. It is uncontroverted in the record that Coleman was familiar with the case and was prepared for trial. It is also

> uncontroverted in the record that Hancock had no relation to the case prior to February 23, 1971, and was completely unfamiliar and unprepared. Nevertheless, the trial began. Coleman was present for the remainder of the day and, along with Hancock, conducted the defense. When the trial reconvened on February 24, 1971, Coleman was not present and Hancock conducted the defense. Petitioner was found guilty and punishment was fixed at ten years imprisonment.

569 F.2d at 1320. The Court stated that the proper exercise of discretion under these circumstances requires a delicate balancing between the defendant's due process right to adequate representation by counsel of his own choice and the general interest in the prompt and efficient administration of justice. The court held that what is fair or reasonable depends upon the surrounding circumstances. The factors that should be considered are (1) the length of the requested delay; (2) whether lead counsel has an associate who is adequately prepared to try the case; (3) whether other continuances have been requested and granted; (4) the balanced convenience or inconvenience to the litigants, witnesses, opposing counsel and the court; (5) whether the requested delay is for a legitimate reason or whether it is dilatory and contrived and (6) whether there are other unique factors present. 569 F.2d at 1324. *See also United States v. Burton*, 584 F.2d 485 (5th Cir. 1978); *United States v. Uptain*, 531 F.2d 1281 (5th Cir. 1976).

The total absence of a uniform standard for evaluating the prejudice to a defendant forced to trial with counsel whose effectiveness is materially impaired by lack of preparation has fostered inconsistent results and improper and unsupported judicial speculation concerning the effect of different counsel on the outcome of a trial.

Formulation of a uniform standard by this Court is necessary to avoid continued speculation and disparate results in the Courts of Appeals.

The standard followed by the Fifth Circuit is the standard most consistent with the recognized objects of the Fifth and Sixth Amendments and should be the test adopted by this Court.

CONCLUSION

For the reasons stated, Petitioner prays that this Court issue a Writ of Certiorari.

Respectfully submitted,

WILLIAM B. MOFFITT
J. FLOWERS MARK
NINA J. GINSBERG
MARK & MOFFITT, P.C.
1001 Duke Street
Alexandria, Virginia 22314
(703) 549-4333

GERALD BRUCE LEE
LAW OFFICES OF
GERALD BRUCE LEE
1001 Duke Street
Alexandria, Virginia 22314
(703) 549-1172
Attorneys for Petitioner.

April 2, 1981

APPENDIX A

JUDGMENT

United States Court of Appeals
for the
Fourth Circuit

No. 79-5068

United States of America,

Appellee,

vs.

Lynn Edward Fletcher,

Appellant..

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

William K. Slate II
CLERK

[Filed Dec. 18, 1980]

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-5052

UNITED STATES OF AMERICA

Appellee

v.

DONALD DAVID HAYNIE

Appellant

No. 79-5053

UNITED STATES OF AMERICA

Appellee

v.

MICHAEL VLCEK

Appellant

No. 79-5068

UNITED STATES OF AMERICA

Appellee

v.

LYNN EDWARD FLETCHER

Appellant

No. 79-5069

UNITED STATES OF AMERICA

Appellee

v.

PAUL MAX JENKINS

Appellant

No. 79-5070

UNITED STATES OF AMERICA

Appellee

v.

JEAN A. MORRISSETTE

Appellant

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Argued August 21, 1980 Decided December 18, 1980

Before RUSSELL, WIDENER, and PHILLIPS, Circuit Judges.

Michael Kennedy for Appellant David Haynie; William V. Moffitt (Lowe, Mark, Moffitt, Ford and Barton, on brief) for Appellant Lynn Edward Fletcher; (Michael R. Abramovic on brief) for Appellant Michael Vlcek; (William A. Powers on brief) for Appellant Michael Vlcek; (Gerald B. Lee, Wiggs, Lee & McClerklin, on brief) for Appellant Lynn Edward Fletcher; (Sheryl E. Reich on brief) for Appellants; (J. Frederick Sinclair on brief) for Appellant Paul Max Jenkins; (Larry G. Turner, Turner & Morris, on brief) for Appellant Jean A. Morrissette; (Sebastian K. D. Graber, Norman A. Townsend, Graber, Stettler & Townsend, on brief) for Appellants Donald David Haynie, Michael Vlcek and Jean A. Morrissette; Justin W. Williams, United States Attorney (Karen A. Rebrovich,

Special Assistant United States Attorney, Lori L. Levin, Third Year Law Student, Jerel Yamamoto, Third Year Law Student, on brief) for Appellee.

WIDENER, Circuit Judge:

Appellants, Donald David Haynie, Lynn Edward Fletcher, Michael Vlcek, Paul Max Jenkins and Jean Morrissette, were convicted in the United States District Court for the Eastern District of Virginia of conspiracy to possess marijuana or hashish with the intent to distribute under 21 U.S.C. §§ 846, 963. In addition, Haynie was convicted of conspiracy to import hashish, 21 U.S.C. §§ 952(a), 963; importation of hashish, 21 U.S.C. §§ 952(a), 960 and 18 U.S.C. § 2; and two counts of engaging in interstate travel for the purpose of carrying on an unlawful activity, 18 U.S.C. §§ 2, 1952(a)(13). From these convictions appellants now seek relief. We affirm.

Appellants raise substantial questions with regard to evidence obtained by searches and introduced in the trial. They contend that the fruits of these searches introduced at trial were obtained in violation of the Fourth Amendment and were inadmissible. The trial court conducted an evidentiary hearing and denied appellants' motion to suppress. On appeal, the government contends that the searches were valid, and, even if not, no appellant has standing to challenge the propriety of the searches and seizures in question. We find it unnecessary to address the issue of standing because we hold that the searches and seizures complained of were not invalid under the Fourth Amendment.

The Airport Search

At approximately 1:30 a.m. on June 1, 1977, Norman Handshaw (a co-indictee) and one John Bates approached a security screening area in the Palm Beach International Airport. Upon their attempting to enter the boarding area to wait for an associate arriving at that gate, airport security guards requested that Handshaw open the briefcase he was carrying. After expressing his unwillingness and inability to open the case, Handshaw again expressed the desire to pass through the screening area. The security officers again refused Handshaw admittance and Handshaw suggested that he and Bates leave the screening area and await the arrival of the flight elsewhere in the airport. Michael O'Brien, a deputy of the Palm Beach County Sheriff's Office assigned to the airport, observed this exchange and noted that Handshaw appeared to be very nervous, had begun sweating noticeably and stammered while discussing the briefcase. Based upon his observations, O'Brien became concerned about the possibility that Handshaw's briefcase might contain an explosive device and directed that the case be passed through an X-ray scanning machine. The X-ray revealed a number of regular, rectangular packages inside the case. Upon observing this, Deputy O'Brien escorted Handshaw and Bates to a lounge in the airport sheriff's office and secured the assistance of Sergeant William Tremmer, head of the narcotics task force of the Palm Beach County Sheriff's Office. Sergeant Tremmer passed the briefcase through the X-ray scanner a second time and then questioned Handshaw concerning its contents. After Handshaw gave conflicting explanations of his knowledge of and interest in the briefcase, Sergeant Tremmer asked whether Handshaw owned the case and was told that he did not. Handshaw subsequently surrendered the case in return for a

property receipt. At the conclusion of this interview, Sergeant Tremmer applied for and received a warrant to search the briefcase. In executing that warrant he found $95,020 inside the case. It is the admission at trial of evidence of this search and seizure to which appellants now object.

Initially, it is clear that the officer's examination of Handshaw's briefcase by means of an X-ray scanner was a search within the meaning of the Fourth Amendment. See *United States v. Epperson*, 454 F2d 769, 770 (4th Cir. 1972), cert. denied, 406 U.S. 947 (1972) (use of magnetometer constitutes search). It is also clear that a search conducted without a warrant is unreasonable unless it falls within one of the classes of permissible warrantless searches. *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973). Here, the search of Handshaw's briefcase falls squarely within one of such classes, and probably within another, which we do not decide.

In *United States v. DeAngelo*, 584 F2d 46 (4th Cir. 1978), cert. denied, 440 U.S. 935 (1979), we upheld the validity of an airline boarding search on facts remarkably similar to those presented here on the ground that it was conducted with the consent of the defendant as well as the ground that the search was not unreasonable. There, DeAngelo presented himself at an airport security screening station and submitted his briefcase to X-ray examination in the presence of signs warning that physical inspection might be requested. When the X-ray examination proved suspicious and DeAngelo was advised that a physical inspection was necessary, he protested that he preferred not to take the flight rather than permit the inspection. Security officers nonetheless opened his briefcase and found quantities of marijuana and hashish. We held that:

> DeAngelo had a choice of traveling by air or by some other means. The signs in the terminal gave him fair notice that if in the course of the total screening process a physical inspection of his hand luggage should be considered necessary to assure the safety of the traveling public, he could be required to submit to it for that purpose. When he voluntarily entered upon the screening process DeAngelo acquiesced in its full potential scope as represented to him if, as it developed, that should be requested. Allowing him to withdraw his luggage when the x-ray raised the suspicions of the security officers would frustrate the regulations purpose of deterring hijacking.
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> 584 F2d at 47-48.

After *DeAngelo*, this case presents no novel aspect. Handshaw voluntarily entered the screening process at the Palm Beach International Airport by presenting himself to security personnel manning an X-ray scanner. While there is no evidence here that signs described the scope of the prospective searches, Handshaw's repeated expressions of his desire to be admitted to the boarding area through a security check point employing an X-ray scanner cannot be construed as other than a knowing consent to the full scope of the search conducted.

As in *DeAngelo*, we do not think that Handshaw's attempt to withdraw from the screening process should be recognized as an act vitiating his consent. While there is a division among the circuits on this point,[1] the rule adopted in *DeAngelo* and reaffirmed here is both prudent and necessary. The danger protected against, air piracy, is

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[1] Cf. *United States v. Skipwith*, 482 F.2d 1272 (5th Cir. 1973), with *United States v. Homburg*, 546 F.2d 1350 (9th Cir. 1976), cert. denied, 431 U.S. 940 (1977).

as great today as it has ever been. It appears to us that a rule under which consent to a screening search is limited by the ability to withdraw at any time could only encourage attempted hijackings by providing a secure exit should detection be threatened.

We also believe the search and seizure was not unreasonable within the meaning of the Fourth Amendment.

The Hanson, Massachusetts Searches

On or around July 14, 1977, the police department of the town of Hanson, Massachusetts received an anonymous telephone call advising that there was a large amount of marijuana in the area of 437 McQuan Street, which was the residence of a Mr. & Mrs. Bizier. At approximately 4:00 p.m. that day, Sergeant John Conroy and another officer surveyed the houses in that area, and, although Conroy was of the opinion that there may have been some marijuana growing at the rear of the Biziers' house, they discovered no other concrete evidence of its presence in the area.[2] During their examination of the area, the officers were approached by Mr. and Mrs. Bizier who asked the reason for their presence. Sergeant Conroy described the Biziers' demeanor as nervous, but nothing else of substance transpired during the conversation, and the officers departed.

Approximately two weeks later, on July 28, 1977, the Hanson Police Department received a second anonymous telephone call concerning 437 McQuan Street. The caller

[2]At this stage of his investigation, Sergeant Conroy's suspicion was principally directed at the Smith residence next door to 437 McQuan Street, for he had previously investigated another marijuana case at that house.

asked whether the police had 437 McQuan Street under surveillance and stated that they should "[g]et down there and note the positions of the cars in the driveway, because there is going to be a drop there tonight, and I am not kidding."

As a result of this call, Sergeants Conroy and Toomey began surveillance of the Bizier residence at 9:15 p.m., from an unmarked car parked across the street.[3] At that time, they noted two vehicles on the Biziers' property arranged with room in the driveway for two more. During the course of the evening the officers observed Bizier leave the house twice, once to look up and down the street for a few seconds. They also observed the front door open and close a third time when Bizier apparently tended to the dog.

At approximately 11:35 p.m. the officers observed two vehicles, a white Duster and a blue Chrysler, arrive together, back into the Biziers' driveway and park side by side. Two people emerged from each car and conferred for a moment near the trunk of the Duster. One of the party then restarted the Duster and backed it farther up the driveway to the corner of the garage. All four individuals then disappeared behind the house. About four minutes after that time, three returned to the Duster and opened its trunk. Sergeant Conroy heard a rustling sound, and, with Sergeant Toomey, crossed McQuan Street with weapon at his side to arrest suspects. As they approached the group, the Duster's trunk was slammed shut. While the suspects were being secured, one of their number (Kenneth Larry Bates) began to walk away from the offi-

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[3]Upon hearing the second tip, it occurred to Sergeant Conroy that 437 McQuan Street and not the Smith residence had been the object of the first tip.

cers and returned only after Sergeant Conroy's second order to halt. Sergeant Conroy noticed a pungent smell which he identified as marijuana emanating from the back of the Duster at this point. At about the same time, Sergeant Toomey noticed vegetable material which he believed to be marijuana on the rear bumper of the Duster and on the ground underneath.[4] Upon securing the trunk key from the pocket of one of the suspects, Sergeant Toomey opened the Duster's trunk, and the officers observed five burlap bales of a brownish-green herb-like substance. The trunk was full of it. One of the bales had a tear at the corner and Sergeant Conroy identified its contents as marijuana.

Sergeant Conroy then realized that one of the four men connected with the drop was still missing, and proceeded to the front door of the Biziers' house, while Sergeant Miggs, one of two later arriving officers, watched the back door. Mr. Bizier opened the front door and, after being advised of Conroy's identity, began to back into the house, saying, "Oh, my God, it's the police." Sergeant Conroy followed him into a living area in which Mrs. Bizier and Jean Morrissette were seated and requested that everyone remain where they were. Morrissette arose and walked into a darkened room adjoining the living room. Sergeant Conroy stated that Morrissette stepped into the dark room and, with three quarters of his body obscured, made a motion with his arm. The officer trained his weapon on Morrissette and said, "[d]on't do it." Morrissette then slowly returned to the living room and was placed under arrest.

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[4] Sergeant Toomey testified that Officer Taber had also commented on its presence there.

Because Mr. Bizier had become hysterical and in order not to awaken the Biziers' sick child, Sergeant Conroy moved Morrissette into the kitchen to administer the *Miranda* warning. Once in the kitchen, Sergeant Conroy saw some notebooks, one of which was open, in plain view on the kitchen table, and $6,285.00 in cash in plain view on the kitchen counter. He seized these items as evidence.

Meanwhile, Sergeant Toomey had entered the house. Both he and Sergeant Conroy reported an odor of marijuana in the house which was particularly strong in the area of the door leading to the cellar stairway. Sergeant Toomey, aware that the basement had not been entered, descended the stairs to look for other people, and discovered a substantial number of bales of marijuana on the basement floor and in an open coal bin. He then proceeded to look in the upstairs portion of the house for people, and, finding no others present, reported what he had observed in the basement to Sergeant Conroy.

Defendants assert that the initial arrest of the three suspects at the rear of the Duster was made without probable cause. The argument goes that the officers would not have been in a position to see or smell the marijuana in the car but for this allegedly illegal arrest and that all subsequent discoveries were, thus, tainted and inadmissible. It is further contended that even if the initial arrests were proper, the opening of the trunk and search of the kitchen and basement of the house were unreasonable in the absence of a warrant.

The Fourth Amendment, applicable to the States through the Fourteenth Amendment, *Mapp v. Ohio*, 367 U.S. 643 (1961), states: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated and no Warrants shall

issue, but upon probable cause. . . ." There is no question that the three individuals accosted by Sergeant Conroy and his partner outside the Bizier residence were seized within the meaning of the Fourth Amendment and were placed under sufficient restraint to require a showing of probable cause. *Dunaway v. New York*, 47 U.S.L.W. 4635 (June 5, 1979). The question is whether the information known to the police at the time of the arrest was sufficient to make such a showing.

The tip received by police on July 28, 1977 was, standing alone, insufficient to supply probable cause for the arrests. Under the two pronged test of *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969), a tip must contain information sufficient to permit an independent determination that the informant is reliable and that his information is based on something more substantial than casual rumor. The anonymous tip received here, on its face and uncorroborated, fails to disclose enough information to demonstrate either fact.

Subsequent evidence gained during police investigation may, however, serve to corroborate a tip, insufficient in itself. *Draper v. United States*, 358 U.S. 307 (1959). In *United States v. Branch*, 565 F2d 274 (4th Cir. 1977), we observed that where the details of a tip were adequately corroborated by police investigation,[5] both the reliability of the informant and the substantiality in fact of his information are established.

In the present case, the officers had been told by the informant to note the position of the cars in the drive-

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[5] Corroboration in *Branch*, supra, consisted of the observation of a "variety of facts" consistent with the tip. The opinion sets them out.

way. On arrival at the Bizier house, they found two Volkswagens in the driveway, obviously arranged so that other cars could enter. They had been told that the narcotics drop would take place that night. The two additional cars, the Chrysler and the Duster, arrived at about 11:30 p.m. that night, as predicted. The tip could only have been understood to indicate that the narcotics drop involved the automobiles in the driveway, and the officers observed a gathering and discussion around the trunk of the Duster, and the backing up of the Duster and opening of its trunk, again consistent with the tip of the informer. The officers heard a rustling sound during the examination of the contents of the trunk of the Duster, again consistent with the tip that the narcotics drop involved the automobiles. Upon the approach of the officers toward the men gathered around the cars in the driveway, the open trunk of the Duster was slammed shut, again consistent with the tip that a narcotics drop was taking place. Also consistent with a narcotics drop was the lateness of the hour.

Although the identity of the informant was undisclosed and thus his realiability had not been ascertained prior to the time the arrest took place, each detail of the informant's tip had been verified by the time of the arrest. The date was the same; the time was the same; the place was the same, even to the driveway; the automobiles in the driveway were involved, all as predicted; and, as in *Draper*, by the time the arrest was made, the officers had corroborated every facet of the information given except whether the men present had accomplished their mission and had the marijuana on hand. *Draper*, p. 13. As in *Draper*, we think there was probable cause for the arrests in the driveway. While the tip alone and its subsequent detailed independent corroboration furnished suffi-

cient probable cause for the initial arrests, the officers also knew of the earlier tip, the suspected marijuana plants at the address, and the nervous behavior of the Biziers on the earlier occasion, which would at the least fortify the reasonableness of the officers' actions.

We are thus of opinion there was probable cause to arrest the three men in the driveway.

Contemporaneously with the first three arrests, Sergeant Conroy detected the odor of marijuana emanating from the back of the Duster, and Sergeant Toomey observed marijuana on the rear bumper and on the ground underneath. This established probable cause for the search of the trunk as well as placing the search within the plain view doctrine, for this circuit has held that probable cause may be supported by the detection of distinctive odors, as well as by sight. *United States v. Sifuentes*, 504 F2d 845 (4th Cir. 1974) (marijuana); *United States v. Gills*, 357 F2d 299 (4th Cir. 1966) (moonshine whiskey). See also *United States v. Burrow*, 396 F.Supp. 890, 895-96 (D. Md. 1975) (marijuana).

This leaves the question of the justification of the warrantless search of the trunk of the car which took place. We think it justified under the plain view doctrine.

As we have expressed above, the officers had a right to be where they were to effect the arrests. Their discovery of the marijuana was inadvertent, *Coolidge v. New Hampshire*, 403 U.S. 433, 469 (1971), because the officers did not know the location of the marijuana in advance and intend to seize it, they could not have obtained a warrant to search the trunk of the Duster which they had never seen and could not have described to a magistrate. Similar circumstances are specifically referred to in *Coolidge* at p.

482.[6] Being where they had a right to be, they not only smelled marijuana, they observed it on the rear bumper of the car in plain view. This gave them the right to open the trunk of the Duster to search for it. We think there is no distinction between the marijuana in sight on the bumper and that smelled in the trunk. Both were in plain view within the meaning of the Fourth Amendment if they were "obvious to the senses." *Sifuentes*, p. 848.

In *Sifuentes*, the marijuana involved was in closed cardboard boxes on the seat of a van which had been impounded by the police. The police smelled the marijuana when they opened the door of the van to drive it away, and they examined the contents of the closed boxes. The court held that "these facts combined to place the contraband in plain view, that is, obvious to the senses." We think the marijuana in the trunk of the Duster was no less in plain view than the marijuana in the boxes on the seat of the van in *Sifuentes*.

While we are aware that *Coolidge* stated that "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears," 403 U.S. at 461, we note that several of the facts justifying an automobile search under the doctrine established in *Carroll v. United States*, 267 U.S. 132 (1925), and cases following, are present. One of the men involved in the narcotics drop was at large; there was contraband involved, marijuana; a police guard would have been necessary to immobolize the Duster during the period of more

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[6] "We did not indicate there [a search incident to arrest in *Chimel v. California*, 395 U.S. ___ (19 __)], and do not suggest here, that the police must obtain a warrant if they anticipate they will obtain specific evidence in the course of a search." 403 U.S. at 482.

than an hour necessary to get a warrant; and at least the seizure of the vehicle would have been necessary without a warrant, if not its contents. *Coolidge*, p. 462; *Chambers v. Maroney*, 399 U.S. 42, 51-52 (1970). But, because we think the marijuana in the trunk of the Duster was in plain view within the contemplation of *Sifuentes*, we need not decide whether the automobile exception has application here to render the evidence of the contents of the trunk admissible. We also need not decide the validity of other grounds which the government says should sustain the search of the trunk.

Since *Payton v. New York*, 48 L.W. 4375 (April 15, 1980), it is clear that the entry, without a warrant, into the private home of the suspect to arrest him routinely for a felony is invalid under the Fourth Amendment. In both cases involved in *Payton*, probable cause existed to believe that the suspect was guilty of a felony and that each suspect was in the home where the polic searched; indeed, upon knocking at the door of suspect Riddick's home, and having the door opened by a child, the police saw Riddick. In Payton's case, a shell casing was found as a result of the search for him was admitted in his murder trial, and in Riddick's narcotics and related paraphernalia were found in a search for weapons, which were later introduced into evidence in a trial on narcotics chages.

While the two homes involved in the *Payton* case were those of the suspects, we need not decide what different rules, if any, exist for arrest without a warrant in the home of the person arrested and in the home of another, Cf. *Wallace v. King*, No. 78-1399 (4th Cir. 1980), for the rule of the *Payton* case does not apply where there are exigent circumstances. "Absent exigent circumstances, that threshold [of the home] may not reasonably be crossed without a warrant." 48 L.W. 4375, 4380. With

that in mind, we think the entry of the officers into the Bizier home was authorized by the doctrine of hot pursuit, which was recognized in *Payton* as the prevailing rule at the time of the adoption of the Bill of Rights. 48 L.W. 4375, 4382.

In *Warden v. Hayden*, 387 U.S. 294 (1976), the Court recognized the doctrine of hot pursuit as an exception to the Fourth Amendment requirement of a warrant, saying "The exigencies of the situation made that course imperative." 387 U.S. at 298. In *Warden*, a cab company in Baltimore was robbed at about 8:00 a.m. on its business premises. Two cab drivers in the vicinity followed the robber to a given street address and notified the company dispatcher that the robber had entered that house. The dispatcher relayed the information to the police, who arrived at the house within minutes. The entry of the house to search for the suspect followed. The exigencies of the situation there were described as a danger to the lives of the officers or others, and the court approved a thorough search of the house for persons and weapons as the only way of insuring that the suspect was the only man present and that the police had control of all weapons which could be used against them or the effect an escape. Speed was described by the court as essential. In the case before us, four men other than Bizier were initially seen taking part in the narcotics drop, yet only three were initially arrested, so the other one remained at large. The fourth man was last seen going behind the Bizier house. It would have taken an hour to procure a warrant for a man whose identity was unknown, for we remember that Conroy knew Bizier and Bizier's wife, having spoken to them previously and having seen Bizier outside the house on three previous occasions that very evening. At hand in the trunk of the Duster were five bales of mari-

juana weighing 30 to 40 pounds each, so the narcotics drop in which the fourth man was involved was of considerable magnitude; and it was apparent that a large scale narcotics operation was involved, not merely a small scale street-corner transaction, or an outdoor barbecue as suggested, possibly in jest, by the defendants at trial. To have kept all the occupants of the Bizier residence in the home during the time a warrant could have been obtained would have amounted to no less than a siege of the premises, no more authorized in law than a warrantless entry absent exigent circumstances. An officer was sent to watch the rear of the house but had not apprehended the fourth man. The fourth man involved in the narcotics drop not having been observed outside the house, it was reasonable to assume that he was inside. Conroy testified that he intended to go in the house to arrest the fourth man and to see if there was any contraband which was going to be destroyed. He knocked at the door and identified himself as a police officer, at which time Bizier, who had answered the door, became hysterical and backed off. The entry was thus made without either Bizier's expressed consent or opposition. The Biziers had a small, sick daughter in a darkened room adjacent to the room in which Morrissette was arrested, so, in order not to disturb the child, Conroy took Morrissette into the kitchen, where he sat Morrissette down at the table to give him his *Miranda* rights, which was done. While Conroy was in the kitchen, he observed, on the table in plain view, two notebooks containing records of marijuana transactions, and on the kitchen counter in plain view was a sum in excess of $6,000. These items were seized as evidence. The house smelled of marijuana. Conroy could smell it when he came in the front door. In was particularly strong at a door leading to the basement. Both Conroy and Sergeant Toomey smelled it. Toomey,

who meanwhile had been let in the back door by Bizier, in looking around to see if anyone else was present, found more bales of marijuana and other narcotics paraphernalia in the basement which were also seized. No other search was made by the officers.

As we have indicated, we think Conroy's entry was justified as an entry in hot pursuit of Morrissette. The fourth man had vanished just moments before; it was only reasonable to believe he was in the house; and speed was essential. The notebooks and money were in plain view of the officers in the kitchen, where Controy had taken Morrissette in order to avoid distrubing the sick child. The marijuana in the basement was smelled by the officers and thus was in plain view under *Sifuentes*. Even were that not true, the officers had a right to check the house to see if anyone else were present, an elementary precaution for their own safety, and the intrusion they made into the house was no more than was necessary to effect the arrest and take elementary precautions for their own safety. Morrissette's wallet was also seized by Conroy, it having been discovered by Conroy on the child's bed in the darkened room after Morrissette tried to remove himself to that room at the time he was arrested. If issue be made of this seizure[7], we think it was incident to the arrest. We think the search made of the premises was quite limited and entirely in keeping with the rule of *Chimel v. California*, 395 U.S. 752 (1900), which has been construed in *Coolidge* at p. 466, a part of note 24: "Where, however, the arresting officer inadvertently comes within plain view of a piece of evidence, not concealed, although outside the area under the immediate control of the arrestee, the officer may seize it, so long as

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[7]The seizure of the wallet.

the plain view was obtained in the course of an appropriately limited search of the arrestee."

We are thus of opinion the evidence taken from the Duster and from 427 McQuan Street was admissible. We note in passing that, for reasons best known to themselves, neither the government nor the defendants have had transcribed the argument on the motions to suppress which included the court's rulings on the same. We also do not address the question of whether or not the officers were entitled to enter the premises to prevent the destruction of evidence. They had a right to enter to effect Morrissette's arrest, and the articles seized in the house were validly taken pursuant to that right. That another motive may have been in mind also should not serve to downgrade perfectly valid actions of the officers, even if additional motive were not valid, which we do not intimate.

The Banyon Road Search

During part of 1977, Haynie resided in a house at 235 Banyon Road on Palm Beach, Florida. This house was rented from a Dr. Richard Wright pursuant to a lease, the term of which expired in November of that year. Upon returning from a trip on December 10, 1977, Dr. Wright became aware that the house was vacant. He took possession of the house, got the key back from a real estate agent, and removed the property remaining there to a warehouse and contacted Haynie concerning certain damages to the house. Haynie and Dr. Wright met to discuss these damages, and Haynie stated that he would make good the cost of any repairs. Haynie was then given permission to go to the warehouse in order to search for some money he had apparently hidden in the television set.

Dr. Wright did not see Haynie at the house at any time after November 1977 although he frequently visited the property between December 10 of that year and January 24, 1978. During these visits, Dr. Wright found the house unoccupied at all times with the exception of one instance in December 1977. On that occasion, Dr. Wright contacted the local police with regard to a Mr. Justice who was in the house, unconscious. Upon responding to this call, police noted that the telephones were disconnected and that the house was devoid of food and clothing.

On January 24, 1978, Officer David Kelley of the Palm Beach Police Department conducted a warrantless search of the house after receiving the written consent of Dr. Wright. Dr. Wright stated that Haynie was no longer living in the house and that it had not been occupied since early December of the previous year. Several crates and a tin can with a false bottom were seized during that search.

Haynie contends that this warrantless search was not justified by Dr. Wright's consent. Referring to the Florida law of property, he claims that the mere termination of lease is insufficient to terminate a landlord-tenant relationship and vest a possessory interest in the landlord. Thus, he argues, if Dr. Wright had no right to regain possession of the premises, neither would he have the right to consent to their search.

While we agree that, absent extraordinary circumstances, a landlord may not give an effective consent for the search of his tenant's property, *Chapman v. United States*, 365 U.S. 610 (1961), it is equally true that, "[t]here can be nothing unlawful in the Government's appropriation of . . . abandoned property." *Abel v. United States*, 362 U.S. 217, 241 (1960). Further, appellant misconstrues the nature of the inquiry under the

Fourth Amendment if he assumes that property rights conferred by State landlord and tenant law are exclusively determinative of constitutional rights. In *Chapman* the Supreme Court declined to ". . . import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law . . . ." 365 U.S. at 617. Thus, "[t]he proper test for abandonment is not whether all formal property rights have been relinquished, but whether the complaining party retains a reasonable expectation of privacy in the articles alleged to be abandoned." *United States v. Wilson*, 472 F2d 901, 903 (9th Cir. 1973). In *Wilson*, a tenant had departed from his apartment and failed to make two weekly payments of his rent at the time of a warrantless search. In spite of the fact that the defendant had left some clothing and a television set on the premises, the court held that any reasonable expectation of privacy in the apartment was terminated and that a warrantless search conducted with the consent of the landlord was valid.

The present case presents a similar situation. Here, the lease expired nearly two months before the search. Haynie had not been seen at the premises for six weeks, and testimony indicates that the house contained no clothing or food and was without telephone service for a like period. Furthermore, Haynie did not protest the removal of his personalty from the property during his December meeting with Dr. Wright as might reasonably be expected of an individual who intended to remain in possession of his residence. These facts indicate that Haynie intended to permanently abandon the property and retained no expectation of privacy therein. Therefore, where police gained entry to 235 Banyon Road with the

consent of the owner, they were justified in conducting a warrantless search on the basis that the residence and its contents had been abandoned by Haynie.

The claim of the defendant Fletcher deserves brief attention. He asserts that his arrest at room 141 of the Holiday Inn near Dulles Airport was without probable cause based upon his mere presence in the room. His argument then goes that his photograph taken as result of the claimed illegal arrest was unlawfully used in grand jury proceedings, and also that the witness Snow would have been unable to identify him had it not been for the photograph.

We do not agree with any of the claims.

We think his arrest was based upon probable cause. Only a small part of the facts surrounding the arrest show that room 141 was the communications center from which receipt of the importation of 800 pounds of illegal hashish was arranged by Haynie and others. Fletcher had been seen in and around the motel just prior to the arrest, and it was known that he was staying in room 141 with Haynie, a key suspect as the leader of the drug ring. The consignee of the hashish, one Coury, also visited room 141 that day. "Consorting with criminals may in a particular factual setting be basis for believing that a criminal project is under way." *Sibron v. New York*, 392 U.S. 40, 68 (1968) (Mr. Justice Douglas concurring). Certainly in the setting around room 141, the known communications center for the importation of such a large amount of illegal drugs, the officers had probable cause to arrest everyone who was reasonably connected with the known participants. Fletcher was so connected.

Even if Fletcher's arrest were improper, use of the photograph before the grand jury was not illegal. *United States v. Calandra*, 414 U.S. 338 (1974); *Stone v. Powell*,

428 U.S. 465, 485 (1976). Additionally, in *United States v. Crews*, 48 L.W. 4324, 4328-29 (May 25, 1980), five justices of the Supreme Court agreed that a defendant's face is not suppressible evidence as the fruit of an illegal arrest.

In all events, the only evidence in the records is that Fletcher was arrested in room 141, December 5, 1977. The witness Snow, a member of the drug ring, did not go over to the government until February 1978. Shortly before that time, in 1978, and following Fletcher's previous arrest at room 141 in December 1977, Fletcher was the keeper of a house which Snow used in connection with the illicit drug operation. At that time, and before Snow went over to the government, Fletcher told Snow about the arrest at room 141. Thus, Fletcher had told Snow about the arrest at room 141 before Snow went over to the government and before Snow had access to the photographs taken by the government at the time of the arrest in room 141. So far as it relates to Snow's testimony, Fletcher's claim also has no factual foundation. In passing, we note that the identification of Fletcher has been in no way related to his arrest photograph, either by Snow, or before the grand jury, or otherwise in the investigation.

We have also considered the remaining assignments of error including the admissibility and sufficiency of evidence; the suppression of evidence by the prosecution; the denial of a motion for continuance; the jurisdiction of the court; and the imposition of sentence upon Haynie. We think all of these arguments are without merit.

Accordingly, the judgments of convictions are

AFFIRMED.

APPENDIX C

United States Court of Appeals
for the
Fourth Circuit

No. 79-5068

Lynn Edward Fletcher

Appellant

v.

United States of America

Appellee

ORDER

There having been no request for a poll of the court on the petition for rehearing en banc, it is accordingly ADJUDGED and ORDERED that rehearing en banc shall be, and the same hereby is, denied.

The panel has considered the petition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and the same hereby is, denied.

With the concurrences of Judge Russell and Judge Phillips.

For the Court

[Filed Feb. 19, 1981]

APPENDIX D

United States Court of Appeals
for the
Fourth Circuit

No. 79-5068

United States of America,

Appellee,

versus

Lynn Edward Fletcher,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Upon consideration of a motion of the appellant, by counsel, for stay of mandate pending application to the Supreme Court of the United States for a writ of certiorari,

IT IS ORDERED that the motion is DENIED.

For the Court - by Direction.

/s/ William K. Slate, II
Clerk

[Filed Feb. 25, 1981]

APPENDIX E

United States Court of Appeals
for the
Fourth Circuit

No. 79-5068

United States of America,

Appellee,

versus

Lynn Edward Fletcher,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Upon consideration of the motion to reconsider the Court's February 25, 1981, order denying a stay of the mandate,

IT IS ORDERED that the motion to reconsider is granted in light of the fact that petitioner may serve his full six-month sentence prior to a decision on the merits of his petition by the Supreme Court of the United States. A stay of the mandate is granted for this reason only.

For the Court - by Direction.

/s/ William K. Slate, II
CLERK

[Filed March 4, 1981]